In the Supreme Court
OF THE
United States

October Term, 1956

No. 39

United States of America,
Petitioner,
vs.
Paul E. Plesha, James E. Mabbutt and Myron L. Kern,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' BRIEF.

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RESPONDENTS' BRIEF.

I. JURISDICTION.

Jurisdiction also rests on 38 U.S.C. Section 817. This section and pertinent portions of 38 U.S.C. Section 445 to which it refers are set forth in Appendix A.

II. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fifth Amendment to the Constitution of the United States is set forth in Appendix B.

III. QUESTIONS PRESENTED.

As indicated in our Memorandum of Non-Opposition to Granting of Writ of Certiorari heretofore filed herein, we believe that this case presents the following questions in addition to the one stated at page 2 of the Government's Brief:

1. If the Civil Relief Act imposed an obligation to reimburse, what was the measure of that liability: To reimburse the United States for the amount it would have paid on account of the protection of the particular policy if the United States had settled with the insurance company in accordance with the terms of the 1940 Act; or to repay the greater amount which the Government actually paid the company in accordance with the terms of the 1942 amendments?

2. Did the 1942 amendments to said Act extend the period of protection of policies placed under protection before the enactment of such amendments?

3. Assuming that the 1940 Act imposed on each respondent the obligation to reimburse the Government for the amount which it might pay on account of the protection of his policy in accordance with the terms of that Act, could the 1942 Congress, without violating the Fifth Amendment to the Constitution of the United States, increase the burden of that obli-

gation without his consent by increasing the amount which the Government would pay to the insurance company and requiring him to reimburse the Government for such larger payment?

4. Was the United States entitled to collect, by way of offset against respondents' National Service Life Insurance dividends, the amounts it did deduct from such dividends?

IV. STATEMENT OF FACTS.

Facts not mentioned in the Government's Statement (Br. pp. 2-7) include the following:

After respondents' policies were placed under protection the insurance company reported to the United States, as they became past due, the premiums on each protected policy. These reports were made on so-called "Monthly Difference Reports", following receipt of which the United States issued interest-bearing certificates to the company promising payment of the "difference" shown on such reports. (Testimony of Glenn E. Drummond, R. 186-196, 234-236; Pl. Ex. 6 and 13, R. 125, 196, 235, 261-267, 274.)

Following amendment of Article IV in 1942 (Public Law 732, 77th Congress, 56 Stat. 773-776, effective October 6, 1942) the insurance company, as was its right under Section 408(2) (50 U.S.C. App. Section 548(2)) of such amendments, elected to give up the certificates which had been issued to it, and the "Monthly Difference" reporting system, and to accept

in lieu thereof the method of settlement and the guarantee of premiums prescribed by such amendments. (R. 196-197; Finding 20, R. 135.)

Respondents were not consulted concerning such election, nor were they then advised of it, nor did they then consent to any change in the relationship between themselves, the company and the United States. (Request for Admissions 4 and 5 and Replies thereto, R. 35-36, 38; Finding 27, R. 137.)

After receipt of the form letter FL 9-63 mentioned by the Government (Br. p. 4), respondent Mabbutt wrote to the Veterans Administration requesting termination of protection and this was accomplished some 14 months after his separation. (Answer R. 107; Finding 9, R. 130.)

Respondent Mabbutt made no partial payment to the United States. (Answer, R. 108; Finding 10, R. 130-131.)

V. SUMMARY OF ARGUMENT.

Examination and analysis of the Soldiers' and Sailors' Civil Relief Act of 1940 shows that it was intended to permit men entering the service to maintain life insurance for their dependents despite the reduction in their income consequent upon induction or enlistment. Upon application by the servicemen, provided only that his policy met the statutory requirements, the insurance company was forbidden to lapse or forfeit the policy; and the Government agreed

to pay the premiums if the insured did not do so within one year after separation from service. The Act contains no requirement that the insured reimburse the Government for moneys which it might be called upon to pay the insurance company; it does give the Government a lien on values inhering in the policy, treating the accruing premiums as a policy loan on the sole security of the policy. This is the limit of the Government's rights.

A. Not only does the Act contain no language requiring the insured to reimburse the Government, there is no machinery to effectuate payment from the insureds, no word about time, manner or amount of payment. In significant contrast, the Act contains detailed provisions for the determination and settling of accounts between Government and insurer. The mechanics of this accounting system were such that items concerning individual policies were submerged in a group account, and, because the credits in the Government's favor could and often did exceed the charges with regard to particular policies, it would have been very difficult to find *any* formula which would establish how much of the Government's payment on final settlement should be charged to each insured who had let his policy lapse; much less to find a *fair* formula for doing so. The statutory scheme confirms, in detail after detail, the Congressional purpose to give the Government the limited security available in policy values, and no more.

B. The amendments to the Act in 1942 gave the insurer the right to settle with the Government in

individual cases, and on a basis which substantially increased the amount which would be received for the Government on account of lapsed policies. By express provision new applicants were to be indebted to the United States for payments made on account of these policies, but this provision did not apply to those already protected.

C. A guarantor is not entitled to more than full reimbursement. By taking from respondents' dividends the amount which it paid the insurer under the 1942 settlement formula, an amount substantially larger than the 1940 formula would have produced, the Government has claimed and taken more than the maximum it can claim under its implied obligation theory. The several unsuccessful attempts of the Government to explain the embarrassing disparity between its claim and what its theory could support emphasize the importance of this disparity.

D. and E. The legislative history and administrative construction confirm respondents' position that the Act imposed no liability to reimburse.

F. As a matter of contract, the Government's rights are limited to a lien on policy values. The contract documents, all prepared by the Government, define and delimit the Government's rights and the serviceman's obligation. A liability to reimburse cannot be implied out of these documents without departing from the objective test of mutual assent, and ignoring the rules which require interpretation of doubtful language against the draftsman. Further

the Government's conduct in the premises has been such as to estop it from asserting this liability.

G. The various considerations of policy which are involved here are properly for Congress, not the Courts; and where Congress has not taken a position the Courts should not imply a liability.

H. In addition this Act should be liberally construed to benefit the serviceman.

I. Interpreted as Government would have it, the increase in liability imposed by the 1942 amendments increases the burdens of the contract, taking respondents' property without due process and without compensation contrary to the Fifth Amendment. Such an intention should not be ascribed to Congress.

J. One who asserts an offset has the burden of proving he is entitled thereto. The Government has offered no proof at all to show what respondents' liability would be under the 1940 provisions, the only provisions under which they *could* be held.

K. The Government's argument that it has the rights of a common law guarantor rests on unsound premises. Further under the circumstances of this case its conclusion would not follow even if its premises were established; the theory cannot be reconciled with the provisions of the Act.

L. There is nothing unusual or improper about conferring a benefit upon military personnel or their dependents. In cases where a need for insurance protection of dependents had been established prior to

entry into service by the purchase of commercial life insurance, the very low pay of enlisted men in lower grades in 1940 and the absence of any allowance for their dependents justified and required the preservation of that insurance. The Government's voluntary action to see that the necessary protection was furnished may properly be considered as a gift, as a benefit or as a perquisite of an otherwise burdensome employment. The equitable considerations involved do not compel, and the applicable legal principles will not justify considering the Government's action as an ordinary commercial transaction of guaranty.

VI. ARGUMENT.

The central question of this litigation has been passed upon by five District Courts. Three of the District Courts' decisions, the first three rendered in point of time, were in favor of the Government. These were *United States v. Nichols* (D.C.N.D. Iowa), 105 F. Supp. 543; *Morton v. United States* (D.C.E.D. N.Y.), 113 F. Supp. 496; and the decision of the District Court in this case. So far as can be determined neither *Nichols* nor *Morton* considered the additional questions listed under Heading III above.

Two District Courts ruled in favor of the serviceman. These decisions were *Hormel v. United States* (D.C.S.D. N.Y.), 123 F. Supp. 806, and *United States v. Hendler* (D.C.D. Colo.), 123 F. Supp. 383. The Court of Appeals reversed the District Court

in the *Hendler* case. That decision is reported at 225 F.2d 106.

A. ANALYSIS OF THE CIVIL RELIEF ACT OF 1940.

The Soldiers' and Sailors' Civil Relief Act of 1940 is divided into six Articles. Article IV deals with the protection of private-company life insurance. In the Act it consists of Sections 400 to 414 inclusive. In the Code it is, or was, 50 U.S.C. App. Sections 540 to 554 inclusive. All of Article IV as well as Section 100 and part of Section 604 of the Act (50 U.S.C. App. Sections 510 and 584) are set forth in Appendix A to the Government's Opening Brief. In this brief, as in the Government's brief, we will use the section numbers found in the Act itself, rather than those of the Code.

1. Silence of Act on Question of Reimbursement.

The original Article IV contained a rather elaborate scheme for determining how much the Government was to pay to each insurance company. It provided in detail for the time and manner of final settlement of accounts between Government and company. The Act *did not say* that servicemen were to repay the Government for amounts paid by it to insurers. The Act *did not say* that bringing a policy under protection would make the insured personally liable to pay premiums. There is no provision like that found in Section 406 of the 1942 amendments. There is no requirement that the insured sign a pre-

mium note. There is not one word that tells us how to calculate the amount any one serviceman might have to repay, or that tells us when or how or to whom any such repayment was to be made.

The silence of the Act on these matters means that if there is any obligation to reimburse it must be implied. The Government's position, of necessity, is that the request for and furnishing of protection was a transaction of guaranty which gave rise to an implied obligation to repay the guarantor for any moneys which it might lay out. We will discuss and answer that contention later in this brief. At this point we want to emphasize the significance of the absence of *any* machinery to effectuate repayment from insureds. When contrasted with the very specific provisions concerning the manner in which the Government's liability to the insurance company was to be computed and paid it seems obvious that Congress did not intend and did not contemplate that insureds who allowed their protected policies to lapse would be called upon to reimburse the Government.

2. Provisions of the Act Negating Any Obligation to Reimburse.

Significant as this Congressional silence may seem, we do not need to rest our case on what Congress did *not* say. What it *did* say is even more significant.

a. The "Difference" Method of Determining the Amount of the Government's Liability.

By means of monthly reports by the insurance company on "Monthly Difference Report" forms (V.A. Insurance Form 382; see Pl. Ex. 13, R. 125,

235, 274) a running account between company and Government was maintained on which the Government was charged for each unpaid premium on all of the protected policies issued by that company and on which the Government was credited with every payment of premiums on protected policies plus interest thereon at the policy loan rate if the premium had been past due when paid. (Section 406.) Each report showed the "difference" between such charges and such credits and the company got a certificate in the amount of this difference on which the Government would pay interest at the rate set by the Secretary of the Treasury, which was 3 per cent per annum, not compounded. (Sections 406, 407, 408; 38 Code Fed. Reg., 1941 Supp., Sec. 10.3312; Finding 23; R. 136.) On final settlement the amounts of all of the certificates, i.e., the aggregate of all of the "differences", would be credited to the company and the cash surrender value of all lapsed policies credited to the Government, provided that in no case was the credit to be *more* than unpaid premiums plus interest at the policy loan rate. (Sections 411, 412.)

Note that the Government's liability was not to be computed nor final settlement effected on the basis of individual policies, but that the amount it might eventually be called upon to pay a particular insurer was the *difference* between all credits and debits on one running account covering *all* protected policies of that insurer, plus simple interest at 3 per cent per annum. In other words, the Government's obligation was to be measured by the aggregate experience

of groups of policyholders, not by the individual experience on individual policies.

As stated in *Hormel v. United States,* supra, 123 F. Supp. at 812: "This is not a merely verbal difference. The lump sum settlement provided for is an amount which differs from the total that would be recovered if the Government should succeed in recovering in every case what it here seeks."

The reason for the difference lies in the provisions for credits in the Government's favor where the insured died or reinstated, or where there was substantial cash value in lapsed policies.

When a protected policyholder died during the period of protection the amount of any unpaid premiums plus interest at the policy loan rate (6 per cent compound in the cases of these respondents, and more than 3 per cent throughout the insurance business, R. 225-227) was deducted from the proceeds payable to the beneficiary and credited to the favor of the Government on the next Monthly Difference Report. So, due to the difference between the 3 per cent simple interest which had been accruing on the unpaid premiums and the 6 per cent compound interest which was credited to the Government on the Monthly Difference Report, that credit would be larger than the total amount, including interest, which had been charged against the Government on that policy; *and* on the final accounting between the Government and the insurer the "profit" that the Government had made on each death case would reduce

the amount the Government had to pay the insurer to something *less than* the total of unpaid premiums on policies that were allowed to lapse after protection plus 3 per cent simple interest on such premiums.

Likewise, if any insured reinstated his policy by paying the premiums which had accrued during the period of protection the Government would have received a credit for the unpaid premiums plus interest at the policy loan rate (Section 410; 38 Code Fed. Reg., 1941 Supp., Section 10.3313), and since all companies were charging more than 3 per cent on policy loans, the Government's net liability would have been reduced by each reinstatement.

Still further, if any protected policy, at the time of final settlement, had a cash value which exceeded the unpaid premiums plus 3 per cent interest thereon, the Government would profit because under Section 411 it was entitled to credit out of cash value up to the amount of the unpaid premiums plus interest at the policy loan rate.

A simplified example, illustrating how these factors would affect the Government's liability, is attached as Appendix C.

Additional examples of how the Government's theory would have worked out in practice are set out in the opinion in *Hormel v. United States*, 123 F. Supp. 806, 814-816. In one example the serviceman would have been obligated to pay the Government where the Government had not been required to pay out a penny on the policy involved!

b. The Difficulty of Computing the Amount of Any Serviceman's "Obligation".

At this point it would be more than a little difficult to determine what the Government would have paid any one insurance company on final settlement under the 1940 Act. It would be necessary to compile Monthly Difference Reports for the post-1942 period, and to make some decision as to the date on which final settlement would have occurred. Of course, we would not have these difficulties and the amount owing to each company would have been relatively easily determined if the original settlement system had not been abandoned.

Since the limit of the right of a guarantor to recover from the principal obligor is the amount actually laid out in his behal (see Heading VI. C. 1., infra), it would be necessary to find some means of apportioning the Government's payment to each insurer in order to determine how much any single protected insured owed the Government.

It would be exceedingly difficult to do this. The simplest possible apportionment would be to divide the Government's payment to each company in proportion to the amount by which the unpaid premiums on each policy exceeded the cash value thereof at time of lapse. But the fairness of any such rough system of apportioning the "loss" would be open to serious question.

In the first place no such formula, nor for that matter any repayment formula at all, is to be found in the Act. Second, if the Veterans' Administration

had allowed one insured to borrow on his policy or take off accumulated cash value or dividends as permitted by Section 408, the result would be to give to him a larger share of the profit differential than he would otherwise get, and to decrease the share of all of the others proportionately. Third, such an apportionment would involve charging each insured with interest from the time of lapse to the time of settlement, a period when the insured was getting no benefits and the Government was enjoying the use of the money it owed the company. While it can be argued that the applicant knew this waiting period was involved, it is also arguable that he should not be charged for the Government's decision to postpone payment, particularly in view of the fact that only the Government had power to fix the date of final settlement, and thus the power to hold off final payment, until 18 months (6 months under Section 604 plus one year under Section 411) after it decided, in view of all of the many considerations involved, to terminate a war with a treaty of peace.

Charging interest for the waiting period raises a more difficult problem (discussed under Heading VI. C. 2., pp. 25-26, infra) because the total interest paid to the company would fall just as heavily on those whose policies had lapsed at or just before final settlement as upon those whose policies had lapsed years before that time.

Some men, after letting their policies lapse, have paid the Government something in response to its collection letters (see R. 299-304), and others un-

doubtedly paid the full amount demanded rather than go to the trouble of disputing the matter. Each such payment, and particularly the payments in full, would distort the picture further, and make it necessary to try to spread credit for such payments among those who didn't pay. And how could any formula equitably apportion the profit which the Government made on each such full payment?

It is indeed hard to believe that Congress could have intended to impose a liability to reimburse without devising a more workable system for determining the amount of each man's obligation.

c. Indemnification Out of Policy Values.

The Act speaks positively and in detail on the matter of what ~~happens~~ if the United States is called upon to pay. "To indemnify it against loss" Section 408 gives the United States a lien on protected policies and protects the security of such lien by prohibiting policy loans, settlements (by way of taking cash value or otherwise) and the payment of dividends except with the consent of the Veterans' Administration. If the policy is allowed to lapse Sections 410 and 411 preserve the policy's cash surrender value so that all or part of it may be allowed as a credit in favor of the United States on final settlement.

In each case where there are values inhering in the policy itself the Government in Sections 408, 409, 410 and 411, puts its finger on those values, to the extent of premiums plus interest at the policy loan

rate, forbids the alienation of such values, and thus protects itself to the extent that it can out of the policy itself. This much the Congress required for the protection of the Government—this much *and no more.* Here was the place to require payment if repayment was to be required. The possibility of financial loss to the Government was not overlooked—it was here considered and provided for *to the extent that Congress then desired to provide it. Expressio unius est exclusio alterius!*

B. ANALYSIS OF THE 1942 AMENDMENTS.

The amendments (56 Stat. 773, 50 U.S.C. Sections 540-548) were extensive. Article IV was completely rewritten, and the whole scheme of insurance protection was substantially changed. The text of the amended Article IV is attached to the Government's Brief as Appendix B. Again we will take section numbers from the Act rather than from the Code.

1. Increase in Government's Liability at Election of Insurance Company.

Section 408(2) of the 1942 amendments gave the insurance companies the right to elect to abandon the system of accounting and settlement set up by the 1940 Act in favor of a new procedure where settlement would be made on individual policies shortly after lapse, and where they would be paid for unpaid premiums plus interest at the policy loan rate.

This is of particular importance here because the amount which the United States deducted from the

appellants' dividends was the amount which it was required to pay under the 1942 amendments, an amount substantially *greater* than it would have been required to pay under the 1940 payment formula.

The increase was due not only to the increase in the interest paid by the Government from 3 per cent simple to interest at the policy loan rate, but also to the extension of the period of protection from one to two years after termination of service and the elimination of the profit factor.

2. Extension of the Period of Protection.

Section 403 of the 1942 amendments extended the period of protection from one to two years after separation from service. Without their request respondents' policies were kept under protection a year longer than contemplated in the original contract, the insurer was paid for the extra year, and the amount deducted included the payment for the extra year. Was the extension applicable to previously protected policies? Section 403 does not by its terms apply to policies already under protection. And Section 408(1) says that the provisions of the 1940 Act remain in full force and effect with regard to all prior valid applications.

3. The Express Indebtedness Provision Added in 1942 Applies Only to Subsequent Applicants.

a. Section 406 Says Just That.

The indebtedness provision of Section 406 as amended in 1942 is as follows:

". . . The amount paid by the United States to an insurer *on account of applications approved under the provisions of this article, as amended,* shall become a debt due to the United States by the insured on whose account payment was made and, notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the United States or as otherwise authorized by law." (Italics added.)

Here is the indebtedness provision which the Government says shows Congressional recognition that a liability to repay was imposed by the 1940 Act. Does it show that? No! The indebtedness provision of the 1942 Act is expressly limited to applications approved under the Act *as amended.* The natural implication from this is that there was no indebtedness on account of applications approved *before* the amendments. As will be pointed out below (Heading VI. D. 3., pp. 33-36, infra) the legislative history shows that the words in italics were added to the original draft of the proposed amendment to the Act. In the words of the Court below:

"If veterans were liable for such payments under the 1940 Act, the additional language limiting the indebtedness provision to applications received after the effective date of the 1942 Act would have been pointless." (227 F. 2d at 628; R. 330.)

b. Section 408 Says Previously Protected Policies Not Affected by Amendments.

Section 408 makes a basic differentiation between the rights and obligations of insureds who applied

for protection before the amendments, and the rights of insurance companies as to such previously protected policies. The provisions of the old Act "remain in full force and effect" so far as the insureds are concerned; but the insurance companies are given the option, *whether or not their insureds agree,* to settle with the Government on the basis of individual policies and to collect interest not at 3 per cent, but at the policy loan rate.

It is impossible to reconcile Section 408(1) which says the rights and obligations of the insured are unchanged, with a requirement that the insured pay the Government what it paid the insurance company under the new, increased, 1942 payment formula.

If the Government's position here is correct it means that the 1942 Congress gave the insurance companies uncontrolled discretion to increase the "liability" of each of their insureds to the Government, and also gave these companies strong inducements to do just that. Is it reasonable to assume that Congress intended to put such power in the hands of these companies with complete disregard for the rights and feelings of the very servicemen it was trying to protect? Or is it more reasonable to assume that Congress was not concerned with what effect the insurance companies' election would have on individual servicemen because there would be no effect, there being no liability to repay in the first place?

We feel sure that the 1942 Congress had no idea of going to the men whose policies were already pro-

tected and telling them that Congress had modified their contracts, unilaterally and without their consent, increasing the burdens thereof as the price of continued protection. It is unthinkable that Congress would attempt to increase such burdens *without* telling the servicemen involved what had been done and giving them a chance to withdraw.

C. THE IMPOSSIBILITY OF RECONCILING THE DEDUCTIONS ACTUALLY MADE WITH THE THEORY OF IMPLIED OBLIGATION.

1. **A Guarantor Is Not Entitled to More Than Full Reimbursement From the Principal Obligor.**

> "Where a surety discharges the obligation on which he is liable by the payment of an amount less than its face value, or by the transfer of property of a lesser value, the general rule is that the principal has the right to the benefit of the bargain, and that the surety can recover from the principal no more than the amount paid by him or the value of the property transferred."
>
> 50 Am. Jur. 1068.

See, also:

50 Am. Jur. 760, Subrogation, Section 119;
118 A.L.R. 416.

This means that the very most which the Government could recover from any one protected insured would be his share of what the Government had paid his insurance company on final settlement in accordance with the procedures set forth in the 1940 Act.

2. The Deductions Made Do Not Correspond With the Asserted Implied Obligation.

What the Government has taken from respondents is what it paid the insurance companies under the 1942 payment formula, namely, unpaid premiums plus interest at the policy loan rate. This means that the factors on which the computation of respondents' assumed liability would be based have been changed in at least three respects: (1) The effective interest rate has been changed from 3 per cent simple to 6 per cent compound; (2) the "profit factor" referred to above has been eliminated; and (3) another year of protection has been added.

Twisting and turning on the horns of the dilemma on which it has impaled itself by deducting from respondents' dividends amounts which were arrived at without any reference to the only theory on which it could recover, the Government has conjured up a whole series of arguments in an attempt to explain away the difference.

These arguments fall into four groups: (1) There is no difference. (2) Even if there is a difference the Government is entitled to everything it took. (3) There may be a difference, but it doesn't really amount to anything; and (4) If we took too much we want to retry the case.

The "no difference" group comprises no less than four separate approaches to the problem. The first of these is that the Government is entitled to get back what it paid the company. While this amounts to trying to solve the problem by ignoring it, traces

of this approach remain in the Government's Brief herein. (See Br. pp. 12, 25-29.)

The next "no difference" argument is that there would not be any profit. "Any layman", it is said, could "determine the amount chargeable to the Government's guarantee in each particular instance", because once a policy matured (or was reinstated?) the payment of premiums and interest "eliminated that policy from the ultimate settlement procedure of Section 411 and therefore could not significantly affect the amount required to be disbursed on account of any other policy holder". (Br. pp. 39-40.) This is a patent distortion of what Sections 411 and 412 provide with regard to final settlement. Far from being "eliminated", the credits due to death and reinstatments would be reflected in the certificates to be tendered by the insurer on final settlement. The limitation of Section 411 on the amount of the cash surrender value of any one policy which could be credited to the Government doesn't eliminate *any* policy from the settlement procedure; what it does do is give the Government a profit on another group of policies, those which had more than enough cash value to cover unpaid premiums plus 3 per cent simple interest.

Next, the Government says there *can't* be a difference because if there were the Government's lien would be defeated; there would be no way to figure it out. (See Br. pp. 43-44.) This just doesn't hold water. The extent of the Government's lien is specified with particularity in Sections 409, 410 and 411—it is unpaid premiums plus interest at the policy loan rate if

the policy matures or is reinstated, and in other cases cash surrender value up to an amount equal to unpaid premiums plus policy loan interest. The difficulties that would be encountered in determining how much if anything the Government had paid on account of any lapsed policy where cash value was less than unpaid premiums plus policy loan interest arise because the statute does not specify with particularity, or at all, what is to happen in *those* cases.

The fourth argument in the "no difference" group is that Congress could not have known that the Secretary of the Treasury could fix the interest rate at 3 per cent and therefore could not have anticipated any disparity. (Br. p. 38, fn. 22.) No rate of interest fixed by the Secretary of the Treasury would have eliminated the disparity on all policies, as the rate of policy loan interest varied from company to company and from policy to policy. (R. 225-227.) Congressional unconcern over the rate shows that there was no thought of trying to avoid such disparities or any realization that it was desirable to do so.

There are two subdivisions of the "we were entitled to what we took" group of arguments. First is the claim that "the Act *does* indicate the amount for which the insured is liable; it contemplates that the insured is to pay the defaulted premiums plus interest at the policy loan rate." (Br. p. 39) This, they say, was what the insured owed the insurance company (Br. pp. 21-25) and when the Government paid as guarantor, this is what the insured owed the Government. (Br. pp. 25-29.) In other words, the Government was *entitled*

to take exactly what it did take even though that was more than it would have paid the company under the 1940 formula. This argument ignores the fact that under its theory the Government is not entitled to more than full reimbursement.

Next, the Government claims that "there is no reason why, in the absence of any overreaching the guaranty arrangements between the parties cannot provide" for reimbursement to the guarantor exceeding "his net outlay". (Br. pp. 42-43.) Perhaps the parties could have contracted to this effect. They didn't.

The third group of claims (Br. pp. 40-42) are an attempt to show that what the Government took was really not much different than the amount which would have been payable under the 1940 formula. This, they say, is because (1) the Government would have paid 3 per cent interest after protection had terminated and until final settlement, a longer period than that used in computing the policy loan interest under the 1942 formula; and (2) a guarantor is entitled to be reimbursed for all expenses reasonably incurred by him in connection with his undertaking. This last, presumably, includes the overhead costs of settling up and operating the insurance protection system.

Assuming that the Government would be entitled to reimbursement for interest costs during the period after protection (see Heading VI. A. 3. b., p. 15, supra), and that it has a right to charge its servicemen for the overhead costs of running such a program, only by statistical accident would the amount of liability produced by this method coincide with the amount

actually deducted in any one given case; and it could not coincide in any *two* cases unless two men at the same age took out identical policies on the same day with the same company, obtained protection the same day, were separated from service the same day, and both allowed their policies to lapse.

So far as the interest is concerned, it was possible under Section 410 of the Act that protection of a policy would continue right up to the date of final settlement. In such cases the Government would not have paid 3 per cent interest for a day longer that it was charging 6 per cent compound interest. And, there would be a whole range of cases between that and between the case where the time elapsing between termination of protection and final settlement was sufficient to make up the difference.

To come out even on all of these cases some men would have to be charged much more "overhead" than others—on what kind of a sliding scale is hard to imagine. This of course can't be reconciled with the claim that these men were liable for such overhead as part of their implied liability, for each man owed his ratable share of *all* of the overhead, or there wasn't *any* liability for overhead.

The final approach to the embarrassing discrepancy between what it has done and what its theory could support appears for the first time in the Government's Opening Brief in this Court. Over six years after this suit was filed, and after full argument before two lower Courts, the Government now admits (Br. pp. 44-45) that it might have deducted too much and asks per-

mission to retry the case if it "be limited to its net outlay."

We think our point is established: There *is* a difference between what the Government took and what it might be entitled to take on its implied obligation theory.

3. The Government's Claim Exceeds the Maximum Possible Implied Obligation.

The deductions here not only differed from what the liability might have been under the 1940 settlement formula, they exceeded the maximum possible implied liability under the 1940 Act.

In an effort to show the difference between using the 1942 formula as the measure of appellants' supposed liability and using each appellant's proportional share of the amount the Government would have paid under the 1940 Act formula we introduced our Exhibits 7, 8, 9, and 10. (R. 125, 205-206, 268-271.) A summary of these exhibits is attached as Appendix D. Due to the various uncertainties involved (e.g. when the final settlement under Section 411 would have taken place, the amount by which the Government's final payment would have been reduced by "profits" from other policies; etc.) it is impossible to establish this difference with exactness. Taking the Government's overhead costs into account would further complicate and confuse the picture. However, by eliminating credits from "profitable" policies from our computations, and disregarding overhead, but *including* the 3 per cent interest to the date of settlement, it may be demonstrated

that the difference as to Plesha was *at least* \$57.94, as to Kern \$125.87 and as to Mabbutt \$21.55. This is the difference between the liability actually claimed by the Government (Column 1 of the Summary) and the maximum amount the Government would have been called upon to pay the insurance company if January 25, 1949, had been the final settlement date and only the one policy had been involved. (Column 4 in the Summary.) January 25, 1949 is used because that is one year after the date set for the expiration of the Civil Relief Act by Section 4 of the War and Emergency Powers Termination Act of 1947. (Pub. Law 239, 80th Congress, 61 Stat. 449.) If instead we take the difference between the amount here claimed by the Government and the Government's maximum obligation to the company on the particular policy on a date one year after the termination of the insured's military service (Column 3 in the Summary) the difference for Plesha is \$75.18, for Kern \$169.80 and for Mabbutt \$34.69.

Any attempt to take into account the effect on the liability of each appellant of the deaths of protected insureds of California Western States Life Insurance Company (there were eight such deaths, R. 228-231; see Pl. Ex. 12, R. 125, 213, 273), the reinstatements of protected policies of that company (there were 38 such reinstatements, R. 212; Finding 28, R. 137), and the application of cash values in excess of unpaid premiums would require the use of an electronic computer.

These exhibits demonstrate that the Government *did* take more than its theory of liability could possibly justify. They show that continuing the 3 per cent interest beyond termination of protection does not make up the difference. How much difference would it make if we took overhead into account? Let us asume that we could decide which of the expenses of the Veterans' Administration were properly chargeable, that there was some evidence of what these costs were, and that we could decide how these should be apportioned among all the protected insureds of the several life insurance companies. Once such costs were spread among those "responsible" it seems most unlikely that they would do much more than offset the profit element which we also eliminated from the computations embodied in our Exhibits 7, 8, 9, and 10, much less eliminate the differences there shown.

D. THE PERTINENT LEGISLATIVE HISTORY CONFIRMS RESPONDENTS' POSITION.

1. The 1918 History.

During World War I Congress passed a Civil Relief Act (Public No. 103, 65th Congress, 40 Stat. 440) which had insurance protection provisions much like those which appeared in the 1940 Act. Like the 1940 Act, the 1918 Act was silent so far as any obligation of servicemen to repay the Government was concerned, the only specific provision on the subject being Section 409 which contained the identical provisions giving

the Government a lien on the policy which were placed in Section 408 of the 1940 Act.

The Government has devoted some twelve pages of its brief to a discussion of certain Hearings and Memoranda before a Subcommittee of the Senate in 1918. As reference to Interrogatories 12 and 31 and the Answers thereto (not printed) will demonstrate, we have been unable to locate a copy of these "Hearings and Memoranda" and the Government has refused to supply us with one. Therefore, we must try to glean from the bits of information contained in the Government's Brief what Senator Overman actually said, what Dean Wigmore actually said, et cetera. Our task is not made easier by the fact that at critical points of the discussion the Government substitutes its conclusions as to what was said for what actually was said. And we look in vain for whatever it was in these Hearings and Memoranda that prompted the Administrator to say in his Decision No. 742 (R. 70):

> "It is equally true that statements may be abstracted from the hearings which tend to support arguments that the transaction did and that it did not create a debt."

Relegated to a footnote in an Appendix to the Government's Brief (p. 107, fn. 14) is this significant language from H. R. Report No. 181, 65th Congress, 1st Session, to accompany H. R. 6361 (which became the Civil Relief Act of 1918):

> "If the soldier comes back from the war he will repay the premiums if he continues the policy, and if he lets the policy lapse the Government will be subrogated to *his* rights." (Emphasis added.)

Thus, in what the Administrator has called "as clear a statement as any that may be found in the legislative history" (R. 71), we see that the Government will be subrogated to the *insured's* rights under the policy. This not only negates any idea of an obligation from the insured to the insurer to which the Government might be subrogated, it is a clear indication that Congress was looking no further than a partial reduction of the Government's "financial burden" through realizing on values inhering in the policy itself.

It is hardly surprising that the insurance companies were unhappy with the original draft of the 1918 Act which prohibited lapse but bound neither insured nor Government to pay premiums for the period when the companies were forced to keep the policies in effect. Nor is it surprising that Dean Wigmore and others recognized the basic unfairness of requiring the companies to furnish insurance for which no one was bound to pay. That the "new proposal", providing that the Government would pay if the insured did not, "met the objections of the industry" does not mean that the companies had bargained for or obtained statutory provisions making the insured personally liable to them for premiums or a provision giving them an option to accept or refuse protection. What the companies got was assurance that the premiums would be paid—by the Government—and with that they were satisfied. Dean Wigmore's statements, edited as they are, indicate that the principal if not the only means of recouping the Government's expenditures would be through the lien on policy values. The Government

admits (Br. pp. 53-54; 105) that there was no statement that the protected insured would be obligated to reimburse the Government. But whatever the Senators or Dean Wigmore may have said in subcommittee, this much is clear: There was nothing in the Act, as adopted, which "provided for a consensual arrangement creating an enforceable obligation on the part of the insured for his defaulted premiums" as the Government claims. (Br. p. 53.) The Government has not pointed to any language which says this. They cannot point to any provision which says anything like this because there *is* no such language in the 1918 Act or in the 1940 Act.

2. The 1940 History.

We agree with Administrator's Decision No. 742 that the 1940 "legislative history is of little, if any, help, and the insurance provisions of this Act, like those of the 1918 Act, must be interpreted on the basis of the language employed in the statute". (R. 72.)

House Report No. 3001 and Senate Report 2109, 76th Congress, 3d Session, state that if the protected serviceman does not pay up the unpaid premiums within one year after separation the policy lapses and the cash surrender value accrues to the Government to the extent necessary to meet the cost of the premiums which it has guaranteed.

The liability question was not touched on the floor of the Senate. (See 86 Cong. Rec. 12837.) In the House Mr. Voorhis and Mr. Arends briefly discussed (86 Cong. Rec. 13132-13133) the insurance provisions

of the Act. The Government and the District Court in the *Nichols* case (see 105 F. Supp. at 553) apparently consider these remarks significant. However, analysis of what the gentlemen said shows that neither of them understood Article IV well enough to speak about it with any authority. Both men thought that the *Government* was to pay premiums *as they came due,* and Arends thought certificates were to be issued to the *insured,* that he must pay back the *Government* within *one year* after separation, and that the Government had a lien against *the policy* until it was paid back. What the law provided, of course, was that if the insured did not pay the *insurer* the premiums within one year after separation, the policy would lapse after which the Government's lien attached to the cash surrender value. Before the Government actually paid anything its lien was exhausted and it had no security for the "deficiency". Article IV would have to be almost completely rewritten to conform to the "interpretation" thereof which emerges from these statements.

3. The 1942 History.

Apparently there was considerable dissatisfaction with Article IV of the 1940 Act, for as early as April 16, 1941 the Administrator wrote to the President of the Senate proposing various amendments "to substitute a more workable law". This letter, appended to Senate Report No. 716, 77th Congress, includes the following statement:

> "It is believed that the proposed amendment, if enacted, . . . will eliminate the possibility of

requiring the government to pay premiums on insurance which the insured does not intend to carry except during his period of active service, and will considerably lessen the administrative cost in carrying out the provisions of the article as now enacted."

Bills to effectuate changes in the Act were introduced in both houses (S. 1372 and H. R. 4546) in April 1941. The development of the indebtednes provision in S. 1372 is most interesting. Originally it was

> ". . . The amount paid by the United States to the insurer* shall become a debt due to the United States by the insured. . ." (Asterisk added.)

On May 16, 1941, the words "on account of applications made subsequent to approval of this Act" were inserted at the point marked with an asterisk. (See R. 75; Br. p. 65, fn. 51.)

In October, Senate Report No. 716, offering an entirely new draft of Article IV, inserted at the point marked with the asterisk: ". . . on account of applications approved under the provisions of this Article, as amended."

S. 1372 was passed by the Senate on November 10, 1941, with no further changes in Section 406, which then contained the exact language which ultimately was enacted in October 1942. This November 1941 version of Article IV also included Section 408(1) which kept the 1940 Act in full force and effect as to policies previously protected.

A new bill, H. R. 7029, containing a repayment provision like that adopted by the Senate, was introduced

in the House. In the course of hearings thereon before the Military Affairs Committee, Mr. Breining, the Veterans' Administration Representative, was asked by the Chairman:

> "Q. How are the premiums paid on the existing $5,000? Does the insured pay half and the Government pay half, or does the insured pay all of it?
>
> "A. (by Mr. Breining). The insured is liable for all the premiums of the $5,000 policy, the Government acting really as a guarantor. However, if there is a default, there would not be any liability for the whole amount in excess of the cash value under the present construction of existing law." (Hearings before House Military Affairs Committee, May 25, 1942, p. 38; see R. 79-80.)

Leaving aside for the moment the significance of this statement so far as administrative construction is concerned, we note here that Congress is being told by the top insurance man in the Veterans' Administration that the protected serviceman is not liable to reimburse the Government "under present construction of existing law."

After these hearings H. R. 7164 was introduced on June 1, 1942 (88 Cong. Rec. 4785) and was passed by the House on June 18, 1942. (See 88 Cong. Rec. 5363-5372.) The Government says (Br. p. 67) that this bill was referred to on the floor of the House as a transaction of guaranty. Despite this fact, the bill, as passed, had *no provision* making the insured indebted to the Government for amounts paid by the Govern-

ment to his insurer, although, as seen above, H. R. 7029, on which the hearings were held, and S. 1372 *did* have such a provision. This is not inaction; this is not silence. This is the *elimination* of an unwanted provision from a law which would govern future transactions. The Senate insisted on its version of Article IV, including the indebtedness provision (88 Cong. Rec. 6707) and the bill went to conference.

After conference, the managers on the part of the House in House Report 2481 stated, *inter alia:*

> "Under the House bill, any amounts paid by the United States to an insurer on account of approved applications *do not become a claim* against the owner of the policy. The Senate Amendment (sec. 406) *made* such payments a debt due to the United States and authorized collection by deduction from any future amounts due the insured by the United States. The conference agreement retains the Senate provision." (Emphasis added.)

The 1942 legislative history tells us that the two houses of Congress were in *disagreement* as to whether liability to repay should be imposed with regard to policies protected thereafter. Was the 1942 Congress seriously considering giving "free insurance protection" to subsequent applicants while holding those already protected liable to repay? We think not. Further, and perhaps ~~even~~ more significant, the language added to the original draft of Section 406 and the language of Section 408 (1) seem almost conclusive evidence of an intent to restrict ~~the~~ indebtedness provision to future applicants.

4. The Act of April 3, 1948.

The Civil Relief Act of 1940 was passed more than seven years before the Act referred to on pages 70 and 71 of the Government's Brief. Thus the 1948 Act is too remote in point of time to merit any consideration here. *Penn Mutual Life Ins. Co. v. Lederer,* 252 U.S. 523, 538; *United States v. United Mine Workers,* 330 U.S. 258, 281.

Since the Administrator was preparing to make a collection effort after issuing his Decision No. 742 in 1947, some provision had to be made for the disposition of the money he intended to collect. Even if the 1948 Congress had had the power to arbitrarily settle in the Government's favor the very substantial controversy which was aired in Decision No. 742, there is no statement or implication in the 1948 Act that it intended to do that.

5. Weight to Be Given to Legislative History.

In *Ex Parte Collett,* 337 U.S. 55 at 61, the Court says:

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of § 1404 (a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' Gemsco Inc. v. Walling, 324 U.S. 244, 260, 89 L. ed. 921, 933, 65 S. Ct. 605 (1945)."

We submit: (1) That this is not a case of Congressional silence but one where the words used in the statute indicate with reasonable certainty that Congress did not intend to require reimbursement; (2) that the legislative history, taken as a whole, confirms this position; and (3) that the Government's legislative history argument is not free from "strained processes of deduction from events of wholly ambiguous significance."

E. ADMINISTRATIVE CONSTRUCTION, UNTIL 1943, SUPPORTS RESPONDENTS' POSITION.

1. Regulations, Forms, and Explanation to Armed Forces.

The most significant bit of contemporary administrative construction of the 1940 Act is ignored in the Government's Brief.

Immediate administrative construction of the Civil Relief Act of 1940 was made necessary by Section 401 which required the Administrator of Veterans Affairs to prescribe regulations, prepare and furnish forms, and "issue through suitable military and naval channels a notice for distribution by appropriate military and naval authorities to persons in the military service explaining the provisions" of Article IV.

The original Regulations (38 Code Fed. Reg., 1941 Supp., §10.3300 et seq.; see Answer to Interrogatory No. 4, R. 17) are silent on the subject of repayment. Section 10.3310, which paraphrases Section 408 of the Act, and Section 10.3314, which paraphrases Section

410 of the Act, are about all that can be found which have any direct bearing. There is nothing remotely resembling a statement that the serviceman is under any liability.

The official statement to the Armed Forces (V. A. Insurance Form 385; not printed, see Answer to Interrogatory No. 5, R. 17-18; Finding 25, R. 136) under the headings "Indemnity", "Maturity" and "Settlement" paraphrases the Act. Again *nothing* is said which gives the slightest hint that the Act imposed any obligation to reimburse.

The "Application for Benefits (V. A. Insurance Form 380, R. 291-293), and the Notice of Approval (Form 394, copies of which appear in Defendant's Exhibits A, G and H, not printed; see Finding 24, R. 136) contain positive language as to what consequences would follow if the insured did not pay the premiums within a year after leaving the service. Personal liability is not one of the enumerated consequences. If the responsible officials thought or had any idea that a personal liability to repay had been imposed by Congress it was their duty to so draft these forms, especially Form 380, the application form, as to make clear and certain the Government's right to such reimbursement.

2. Statements of Veterans' Administration Officials.

Shortly after the Act became law, insurance companies and others made inquiries of the Veterans' Administration concerning the very question which concerns us here.

Harold W. Breining, then Assistant Administrator for Insurance and head of the Government's whole insurance program is quoted in the January 31, 1941 issue of the Eastern Underwriter, an insurance trade magazine, as follows:

> "There is no provision in the Act at this time for collecting from the insured the amount that the premium with interest may exceed the cash surrender value at the time of termination." (Answers to Interrogatories 7 and 27, R. 19, 45-46; Finding 26, R. 136-137.)

On February 21, 1941, Mr. H. L. McCoy, then Director of Insurance for the Veterans' Administration, in reply to a question from a Mr. Peters of the Jefferson Standard Life Insurance Company asking whether the protected serviceman could be "embarrassed by the Government" if he let his policy lapse, said this:

> "There is no provision in the Act whereby the Government may be reimbursed by the policyholder in the amount paid to the insurer in those cases where there was no cash surrender value or where such value was insufficient to cover the indebtedness." (Answers to Interrogatories 8 and 28, R. 19-20, 46-47; Finding 26, R. 136-137.)

In the McCoy-Henig correspondence (See answer to Interrogatory No. 29, R. 47-48; Finding 26, R. 136-137) the question was even more point-blank and the answer was the same, that there was no provision in the Act for collecting from the insured.

When we consider these statements, the Administrator's letter of April 16, 1941 to the President of the Senate, quoted above, and Mr. Breining's statement to the House Committee on Military Affairs, also quoted above; when we look at the forms, regulations, and official statement to the Armed Forces; and when we also consider that not until March 1, 1943 did any Government official do or say anything publicly indicating a view that the Act imposed an obligation to repay; we are irresistibly impelled to the conclusion that the original administrative construction of the Act was that it imposed no such liability. See *United States v. Nichols,* 105 F. Supp. at 555-556.

3. Administrator's Decision No. 513.

Administrator's Decision No. 513, issued March 1, 1943, (R. pp. 56-61) does not do much more than state the problem and announce a conclusion. After stating that the Government's voluntary assumption of its "guarantee of premiums . . . was not a contract right and the United States Government received and asked for no consideration for extending the privilege," the Decision announces that "it is believed" that Section 406 of the 1942 amendments

> "was merely in cognizance of the original common law right plus the specific provision which permits set-off . . ." (R. 60.)

Why this abrupt reversal of the earlier position of the Veterans' Administration? The Decision offers this hint:

> "There exists no question as to any modification of a contract; but in any view the Government's gratuitous assumption of liability conditioned upon the insured's application for the benefits of the Act and the insurer's consent would not constitute such type of agreement as would preclude Congressional action looking toward reasonable safeguarding of the public interest." (R. 61.)

This seems to say that the already protected insured had no such contractual rights as would prevent Congress from retroactively imposing the liability on him to reduce or eliminate any financial loss to the Government. By parity of reasoning the Administrator was free to reverse his previous interpretation which, it now appeared, was going to cost too much.

4. Administrator's Decision No. 742.

While Decision 513 was not given wide circulation (see Answers to our Interrogatory No. 3, R. 15-17), its correctness was "seriously questioned" and the Administrator undertook a "careful reexamination" of the question in his Decision No. 742 dated April 1, 1947. (R. 62-94.)

Since the rationale of the Government's position as expressed in its most recent brief is basically the the same as that expressed in this Decision, we will combine our analysis of the Decision with our Refutation of the Government's Arguments, Heading VII, below.

5. **Administrative Construction of the 1918 Act.**

The Government would have us believe that the use of the word "guaranty" in some Government pamphlets and reports amounted to an administrative ruling that the Act created an obligation to reimburse (Br. pp. 54-55), that the 1918 application form "necessarily carried with it an acknowledgment of a future debt or obligation to the United States" (Br. pp. 55-56), that the Government sought and obtained reimbursement in those cases where it had paid the insurer (Br. pp. 14-15; 36; 56-58), that the precise extent of these efforts to collect is not known, but "a list of at least 14 such cases is presently at hand" (Br. p. 57), and that these collection efforts were reported to Congress in 1924 and were known to Congress in 1940. (Br. pp. 15; 36; 57.)

Some of these claims are misleading and the rest are just not true in any sense.

To say that statutory language creates a particular relationship between ~~an~~ insurer and its insured or between the insured and the Government, because Government officials, in actions calling for no nice discriminations between guaranty and indemnity, have characterized the relationship between the Government and the insurer as one of guaranty, is to substitute labels for analysis. See Heading VII. A. 2., pp. 68-70, infra.

The statement about the application form is completely unsupported by the words thereof. The 1918 application form, like its 1940 counterpart, by specifying the particular fund (policy values) from which

the United States could be reimbursed, defined and limited the commitment made by the insured and the rights of the United States. See Heading VI. F. 1., pp. 46-48, infra.

With regard to collection efforts after World War I, at the trial of this case the United States introduced evidence (Exhibits K, L and M, R. 250-251, partially reproduced at R. 305-313) which shows that some collection efforts were in fact made. However, this evidence also shows that it is not true that collections were made in "at least 14 such cases." Defendant's Exhibits show that only *ten* individuals were involved. The total collected from these ten men was \$484.42; and the total of all collections reported to Congress in the Administrator's final report was \$484.42. (Exhibit L; R. 305-312.) Exhibit K (not printed) shows that nine of the ten (records concerning the tenth man for some reason were not included) were still in the service when approached and that military pressures were brought to bear on them.

It would seem reasonable to infer from all this that no efforts were made to collect from anyone except these ten men. Certainly there is no *evidence* of any further efforts, and the Government refused to respond to our Interrogatories 17, 18 and 19 seeking information along these lines. (R. 24-26.)

It seems to us to be stretching things more than a little to charge the 1940 Congress with actual knowledge of the details of an obscure report rendered more than 15 years before, and to assume therefrom that

ever about reimbursement—reflected an understanding that the Act was creating a liability to reimburse. There is no showing in the fragmentary and "selected" evidence on this subject that this so-called administrative construction was brought home to the 1940 Congress so as to have influenced the thinking of that body in the slightest degree.

One more observation on the 1918 administrative construction: It is not correct to say, as did Judge Graven in the *Nichols* case, that "the relatively small loss sustained" in the 1918 operation indicates a construction "that the Government was not to bear the expense of such guaranteed premiums." (105 F. Supp. at 555). To the contrary, Exhibit M shows that the "relatively small loss" was due to the small lapse ratio ($19,868.07 of premiums on lapsed policies, out of $362,399.50 in past due premiums guaranteed—just over 5 per cent), and that less than 3 per cent of the Government's "loss" was recovered by administrative action ($484.42 out of $19,868.07).

6. Weight to Be Given to Administrative Construction.

It is stated in *Nichols* that Decisions 513 and 742 were inconsistent with the "equivocal" position previously taken on the question, and therefore neither construction can be considered to be "of controlling significance." 105 F. Supp. at 555-556. On this point of non-uniform construction see also *Merritt v. Cameron*, 137 U.S. 542; *Burnet v. Chicago Portrait Co.*, 285 U.S. 1; *United States v. Missouri Pacific R. R. Co.*, 278 U.S. 269.

We can agree that the Decisions were inconsistent with the prior administrative construction; we cannot agree that the prior construction was equivocal. The Regulations, the Forms and the explanation to the Armed Forces plainly indicate administrative construction against liability.

Where *reliance* has been placed on a particular administrative construction so that injury would result if that construction were changed, the construction relied on will be given special weight. See *Sanford v. Commissioner*, 308 U.S. 39; *Grand Trunk Western R. R. Co. v. United States*, 252 U.S. 112; *United States v. Alabama G. S. R. Co.*, 142 U.S. 615. Respondents relied and acted on the original construction.

F. AS A MATTER OF CONTRACT THE GOVERNMENT'S RIGHTS ARE LIMITED TO A LOAN ON POLICY VALUES.

1. The Contract Documents Establish and Delimit the Government's Rights.

The liability here asserted is contractual in nature. As in other contract cases the rights and obligations of the several parties depend on the documents they prepared and executed. There is no liability unless those documents provide for it expressly or by necessary implication.

If this is a case of statutory interpretation it is so because the provisions of the Civil Relief Act of 1940 must be considered as part of the contract. But the Act is only one of the contract documents. The Forms

lations and the official explanation to the Armed Forces (Form 385) probably should be considered as contract documents. The documents which were actually signed were the Application for Benefits (Form 380) and the Notice of Approval (Form 394).

In addition to data about the applicant and the policy to be protected the Application contained the following language:

> "I, the insured under the above identified policy issued by the above named insurer, do hereby make application to have said policy protected in accordance with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, and to that end I do hereby consent and agree to such modifications of the terms of the policy as are made necessary by the provisions of the Act; with the understanding that the insurer (Company or Association), by receiving and filing this application, shall be deemed to have assented thereto, to the extent, if any, to which the policy is within the provisions of the Act. . . .
>
> "In consideration hereof, I hereby consent and agree that the United States shall be protected in the amount of any premiums and interest guaranteed on the above numbered policy in the event of its maturity as a claim, or out of the cash surrender value of the policy, at the expiration of the period of protection under the Act." (R. 291-293.)

This, then, was the situation when application for protection was made: The applicant, newly in uniform, at the urging of his superior officers was attempting to put his private affairs in sufficiently good

order so that he could forget such things and concentrate on learning how to fight a war.

Let us assume that he could and did read every word of the Act, the Regulations, the Explanations and the Application. These were all of the materials available to him—unless he was also expected to research the Congressional Record for 1918 and 1940—these were the contract documents.

Nowhere in any of these documents is there the slighfest hint that the serviceman is assuming any obligation to pay premiums or to reimburse the Government for doing so.

To the contrary, so far as the relationship between insured and insurer was concerned the Act provides that if premiums are not paid within a year after separation the policy will lapse. This much was specified; this much and no more. So far as the relationship between insured and Government was concerned there is the agreement "that the United States shall be protected . . . in the event of (the policy's) maturity as a claim, or out of the cash surrender value of the policy . . ." This was all the Act expressly required, *and* all that the Government asked for "in consideration" of its commitment to the insurer.

The serviceman's commitment and the Government's rights are spelled out, specified, defined and delimited in these contract documents.

2. Application of Pertinent Rules of Interpretation Further Demonstrates the Limited Nature of the Government Rights.

a. The Contracts of the United States Are to Be Interpreted in Accordance With the Usual Rules.

"Although there will be exceptions, in general the United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs. *Hollerbach v. United States,* 233 U.S. 165, 171, 172, 58 L. ed. 898, 901, 34 S. Ct. 553; *United States v. Bethlehem Steel Corp.,* 315 U.S. 289, 298, 299, 86 L. ed. 855, 862, 863, 62 S. Ct. 581. We will treat it like any other contractor and not revise the contract which it draws on the ground that a more prudent one might have been made. *United States v. American Surety Co.,* 322 U.S. 96, 88 L. ed. 1158, 64 S. Ct. 866."

United States v. Standard Rice Company, 323 U.S. 106, 111.

See also:

Priebe & Sons v. United States, 332 U.S. 407, 411;

54 Am. Jur. 572, 581-582, United States, Sections 62, 68.

b. The Unexpressed Intentions or Understanding of the Government Cannot Be Considered.

"The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from their outward expressions and acts, and not from an unexpressed intention. It is said that the meeting of minds, which is essential to the formation of a contract, is not determined by

the secret intentions of the parties, but by their expressed intentions, which may be wholly at variance with the former. The question whether a contract has been made must be determined from a consideration of the expressed intention of the parties—that is, from a consideration of their words and acts."

12 Am. Jur. 516-517, Contracts, Section 19.

See also:

Restatement of Contracts, Sections 20, 70, 71.

What was in writing here was certainly such as to justify a belief on the part of the serviceman that the Government was voluntarily providing him with a benefit which went with his military service and which he was not otherwise expected to pay for.

If the Government had a different understanding or intention it had every opportunity to express its views and desires; more, it was required by the Act itself to explain fully and fairly to those it was assuming to help and protect.

Under these circumstances then there is more than the usual basis for holding to the objective test of mutual assent and rejecting evidence of unexpressed intentions. Thus we cannot consider such items as the Voorhis-Arends exchange in the House, the remarks made in a Senate Subcommittee in 1918, or the collections from the ten men after World War II without applying a subjective standard; for even if these things show the thinking of administrators, even if they had affected the thinking of Congress in 1940, they did not find *expression* in any of the contract

documents nor can it be said that the other contracting party knew or should have known of them. At the very best they are evidence of the unexpressed intentions or understanding of *one* of the contracting parties, and as such they are entitled to no consideration.

c. Any Doubts Must Be Resolved Against the Government Which Prepared the Contract Documents.

> "Doubtful language in contracts should be interpreted most strongly against the party who uses it. A written agreement should, in case of doubt, be interpreted against the party who has drawn it."

12 Am. Jur. 795, Contracts, Section 252.

Having prepared all of the contract documents, and having failed to make explicit that which could so easily have been expressed, any ambiguity, any doubt created by such omission should be resolved against the Government and in favor of the serviceman. To now permit the Government to add terms of critical importance to this contract which it suggested and prepared would be to create doubts and conjure up ambiguities where there are none, and then resolve the "uncertainties" thus raised in favor of the draftsman of the contract.

An interesting application of these rules was made in *Kershner v. United States*, 215 F. 2d 737 (C.A. 9). A veteran, insured under the National Service Life Insurance Act, was misled by Government doctors into believing that he had hopes of recovery when there was none. As a consequence he did not exercise his

right to obtain a waiver of premiums due to disability, and he allowed his policy to lapse. His beneficiary sued. The Court held that the somewhat ambiguous and doubtful language of the insurance contract should be construed against him (the Government) who wrote it. "A further reason for generosity in favor of the veteran" was found in the paternalistic position which the Government has assumed toward veterans. Recovery was allowed.

3. The Government's Acts and Omissions Have Been Such as to Estop It From Claiming Reimbursement.

The failure of Congress to say anything in the Act about a liability to reimburse, the failure of the Administrator to draft contract documents which would make the matter clear, or to explain it in his statement to the Armed Forces, the public statements of top officials of the Veterans' Administration, the changes made in 1942 without consulting or obtaining the consent of the servicemen, the failure of the Administrator to circulate to the Armed Forces any information about his Decision No. 513 and the change of position it represented (see Answer to Interrogatory No. 3, R. 15-17), all these things and others have created a situation where the Government ought to be estopped from asserting this liability.

If respondents ever were under a burden imposed by the 1940 Act, that burden should now be borne by the Government as a matter of honor as well as a matter of law.

G. THE COURTS SHOULD NOT IMPOSE SUCH A LIABILITY WHERE CONGRESS HAS NOT SPOKEN.

In *United States v. Gilman*, 347 U.S. 507, this Court was faced with a problem which was basically the same as that involved here. The Government had been held liable under the Federal Tort Claims Act, 60 Stat. 842, 28 U.S.C. Sections 1346, 2671 et seq. for the negligence of an employee. It sued him, demanding reimbursement. The Act did not touch the liability of the employee except to make the judgment against the United States a bar to any action by the claimant against the employee. The Government, however, claimed that it had a common law right of indemnity against the negligent employee, a right to be implied from the legal relationships created by the Act. After weighing the "myriad of problems" involved, including the extent of the burden on the Government and the effect on employee morale, a unanimous Court declined to impose the liability, saying:

> "Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy, which is most advantageous to the whole, involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them."

347 U.S. at 511.

While the considerations involved in *Gilman* and in the case at bar naturally differ to some extent, the same important questions of policy arise in both. There as here the Government asserts a common law right of reimbursement under a statute making the Government liable where it was not liable before the statute was enacted. There as here the right is sought to be implied out of a statute which did not expressly confer it. There as here the right is asserted against one who is or was a Government employee, and one to whom the Government owed various duties on moral and legal grounds. There as here there are a myriad of problems involved in weighing the equities of the situation. Among these are the financial burdens assumed by the Government, and the matter of employee efficiency and morale. Is soldier morale less important than the morale of civilian employees? Involved there and here are "a complex of relationships" between Government and those directly involved in carrying out functions of Government. Moreover, both claims are the product of laws passed by Congress in which it had expressed no position, and both present questions of policy on which Congress has not spoken.

Such differences as there are between the two cases seem to us to furnish additional reasons why a liability to reimburse should not be implied in the case now under consideration. In *Gilman* the employees were personally liable for their negligent acts before the Act was passed; in our case the insureds were not personally liable for premiums prior to placing their policies under protection. In *Gilman* the employees remained personally liable after the Act, the remedy

against the Government being an alternative to the remedy against them; in our case the very question at issue is whether there was any personal liability to insurer *or* Government after protection under the Act. In *Gilman* the Act was completely silent on the question of reimbursement; in our case there are many positive indications in the Act that no liability to reimburse was intended. In *Gilman* there was no statutory obligation resting on the Government to explain the meaning of the Act, and no failure to make that explanation. In *Gilman* there were no misleading official and semi-official statements of the Government's position on the strength of which the employee acted. In *Gilman* the employee's alleged liability did not rest on contract documents prepared by the Government which contained no hint that any liability was involved.

H. THE ACT SHOULD BE LIBERALLY CONSTRUED IN IN FAVOR OF THE SERVICEMAN.

The opinion of the Court of Appeals begins its discussion of the central issues of this case with the following language:

> "The District Court applied a rule of interpretation of the ambiguous provisions of the legislation and the Congressional comment thereon adverse to the veterans for whom the legislation was created, classifying them as amongst those who are engaged 'in an attempt to syphon off some more of this nation's already fast ebbing fisc'.
>
> "With this we do not agree. Rather we think Congress was contemplating the veterans inca-

pacitated by bullet-inflicted wounds, or weakness from treatment while held as enemy prisoners and those having families and dependents to support in occupations lost with their savings exhausted during their war activities and the physicians and dentists who have lost their patients and the lawyers who have lost their clients and the business men who have lost their enterprises.

"This we think is what the Supreme Court also had in mind when it established its rule of liberal contruction favorable to the veteran in construing the Soldiers' and Sailors' Civil Relief Acts. 'The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.' Boone v. Lighter, 319 U.S. 561, 575 (1943); Le Maistre v. Leffers, 333 U.S. 1, 6 (1947)." 227 F. 2d at 626; R. 327.

Here, after due consideration has been given to the language of the Act and to all of the other circumstances and factors which might affect the resolution of this case, we find an additional and a compelling consideration for a decision in the serviceman's favor.

I. INCREASING THE BURDEN OF RESPONDENTS' OBLIGATION, IF ANY, WOULD BE UNCONSTITUTIONAL.

Assuming liability to repay under the original Act, and that the measure of the liability was to reimburse the Government for what it might pay an insurance company under the 1940 settlement formula,

could Congress, without the consent of protected insureds, require them to reimburse the Government for the greater amount which it voluntarily agreed to pay the companies under the 1942 settlement formula?

Here, after all of the imponderables of the situation have been resolved against the serviceman by implying against him the maximum liability that possibly can be implied on any guarantor-reimbursement theory, we come to a question of power. If Congress had the power to increase the liability at all it had the power to increase it to any extent it chose, either for the benefit of the Government or for the benefit of the insurance companies. In this particular case the suggested interpretation of the Act involves *taking the insureds' money without their consent and giving it to the insurance companies.*

Article I, Section 10 of the Constitution proscribing "laws impairing the obligation of contracts" prohibits State Legislatures from increasing the burdens as well as diminishing the efficiency of contracts. *Columbia Railway etc. Co. v. South Carolina,* 261 U. S. 236, 251. But this does not answer our question; this prohibition is not binding on the Federal Government.

Is it the law then that the United States, when it is a party to express or implied contracts, may unilaterally modify such contracts as it wills, and that the other party or parties to such contracts have nothing to say about it? No!

> "When the United States, with constitutional authority, makes contracts, it has rights and in-

curs responsibilities similar to those of individuals who are parties to such instruments. There is no difference, said the Court in *United States v. Bank of Metropolis*, 15 Pet. 377, 392, 10 L. ed. 774, 779, except that the United States cannot be sued without its consent."

Perry v. United States, 294 U. S. 330, 352.

In *Lynch v. United States*, 292 U. S. 571, the United States had sought to avoid its obligations under certain war risk insurance policies issued during World War I. This Court refused to countenance this, observing:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. (Citing cases.) When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power." (292 U. S. at 579.)

Is it any less offensive to due process to make a new contract or increase the burdens of an existing

contract without the consent of the other party than it is to abrogate contract rights? The *Columbia Railway* case, supra, firmly said "no" to a fully analogous question under Article I, Section 10.

There is a further answer to our problem to be found in the just compensation clause of the Fifth Amendment. In *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 589, 602, Mr. Justice Brandeis, speaking for a unanimous Court said:

> "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts . . .
>
> "The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value . . . As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

Is it any less offensive to take from an insured and give to his insurer than it is to take from a mortgagee and give to his mortgagor? The Frazier-Lemke Act had the dubious virtue of taking from the rich and giving to the poor; the Civil Relief Act of 1942, interpreted as the Government would have it, represents an attempt to take from the poor and give to the rich!

We respectfully submit that any attempt by Congress to increase plaintiffs' liability (if any) would be beyond the power of Congress and unconstitutional.

We further submit that it is not necessary for the Court to reach the constitutional question, since there was no liability to be increased.

J. FAILURE TO PROVE THE AMOUNT OF THE OBLIGATION.

In earlier stages of this litigation we have contended that even if it be concluded that the Government is entitled to reimbursement, it did not have the right to offset this liability against respondents' National Service Life Insurance dividends, and further that it has failed to prove how much it was entitled to deduct.

We still hold strongly to the opinion that the administrative interpretation of 38 U.S.C. Section 454a that anything of value obtained by a veteran under color of the laws relating to veterans is an "overpayment" within the meaning of Section 454a is an emasculation of that section.

However, since respondents are not desirous of winning on a technicality, nor of avoiding payment of their obligations if they are obligated, we do not urge this point upon the Court.

This does not quite dispose of the offset point, for if both liability and the right of offset be assumed, the Government has not proved how much it was entitled to take. If the Government is entitled to any repayment from these respondents it is entitled to collect their share of what it would have paid their insurer under the 1940 settlement formula. There has been no proof whatever on this point, as is tacitly admitted at pages 44-45 of the Government's Brief. Having completely failed to sustain the burden of proof which rested upon it (see 47 Am. Jur. 786, Setoff and Counterclaim, Section 103), after having full opportunity to make that proof, the Government should be required to return the moneys which it has withheld.

VII. REBUTTAL OF GOVERNMENT'S ARGUMENTS.

A. THE COMMON LAW GUARANTOR ARGUMENT.

Most of the Government's Brief is devoted to an attempt to prove that its position under the Act was that of a guarantor and that it is entitled to reimbursement as such. The argument can be expressed in this syllogism:

Major Premise: By making application for protection the insured became contractually obligated (as principal obligor) to pay to the in-

surer (as obligee) all premiums coming due during protection.

Minor Premise: Under the Act the Government was the guarantor of that obligation, and when it paid the insurer it paid, as guarantor, the insured's "debt".

Conclusion: Therefore the Government is entitled to reimbursement, as a guarantor, of the amounts which it deducted from appellants' dividends.

1. The Major Premise.

If in fact the insurance company could not compel the insured to pay his premiums, the Government did not pay *his* debt and the whole syllogism falls. The Government admits as much, by its statement (Br. p. 23) "that the concept of guaranty implies the existence of a primary obligation".

It is beyond question that there was no personal liability to pay premiums imposed by appellants' policies (Pl. Ex. 14, 15, 16 and 17, R. 125, 247, 275-287) or by insurance policies generally (testimony of Marcus Gunn, R. 219-222), prior to protection. Did the act of placing a policy under protection make the insured liable to pay premiums when he was not liable before?

The Government tries to supply a "yes" answer to this question by claiming (Br. pp. 53, 104) that the Act provides for a voluntary and consensual arrangement between insured and insurer, wherein the insured was not compelled to keep his insurance in

force, and wherein the insurer was not obligated to agree to keep the policy alive if *it* did not want to enter into the protection arrangement; by claiming (Br. pp. 21-25) that the Act specifically or by necessary implication provides that the insured is liable to the insurer for premiums; and by arguing (Br. pp. 21-22) that in any event an obligation to pay should be implied out of the insured's request that insurance protection be extended during a specific period. With some refinements this is the rationale of Administrator's Decision No. 742. See R. 84-85.

With regard to the first of these propositions, we agree, of course, that the insured was not required to put his insurance under protection. However, so far as we know it has never before been suggested that it was optional with the creditor, the landlord, the tax collector, the insurer, or any of the others whose dealings with servicemen were brought within the reach of the Civil Relief Acts, to grant or deny the serviceman the benefits of those Acts. The language of Section 401 of the 1918 and 1940 Acts is that "by receiving and filing the (application) the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy in which the application is made is within the provisions of this Article". Section 402 of both Acts provides that "the benefits of this Act *shall* be available to *any* person in military service. . . ." (emphasis added.) Section 406 of both Acts says that "every insurance corporation . . . to which application has been made . . . for the benefits of this Article *shall* render" reports concern-

ing all such applications. (emphasis added.) Nowhere in the Act or in the Regulations (see 38 C.F.R., 1941 Supp., Sections 10.3301, 10.3308) is there the least suggestion that the insurer could decline to join in the arrangement, or the tiniest hint as to what procedure is to be followed if it should choose to decline.

The fact that the Acts (1918 and 1940) required the applicant to consent in writing "to *such* modification of the terms of the original contract of insurance *as is made necessary* by the provisions of the Act" (emphasis added) does not prove that he agreed to be personally liable for premiums. The modifications consented to and *made necessary* by the Act were that the policy be not lapsed during protection, the agreement that the Government be "indemnified" (not "reimbursed") out of policy values in matured, reinstated or lapsed policies, that dividends be withheld and that loan and surrender rights be suspended. *These* modifications, and no others, were specifically and expressly agreed to in the application.

Nothing in Sections 409, 410, or 411, does more than require application of policy values in certain specified events. Section 410 provides that if the insured does not pay past due premiums plus interest within a year of separation, the policy shall lapse. If the insured was to be liable to the insurance company for premium payments, Congress could have said so right here, by requiring the insured to give the company a premium note or by just *saying* that he was thus liable. But neither Section 410 nor the application form say anything of the kind. On the contrary, by providing that

the consequence of non-payment is lapse of the policy, and failing to list any other consequence, Section 410 makes it plain that the insurance company could *not* compel the insured to pay.

Terms like "defaulted premiums", "unpaid premiums" and "past due" premiums are entirely consistent with and frequently found in life insurance policies which impose no personal liability to pay premiums.

The requirement that premiums be paid with interest does not prove the existence of an obligation to pay them. (See Br. p. 25.) There is no obligation to repay policy loans on life insurance but such loans bear interest.

Nor does the existence of a lien prove a debt to pay premiums. (See Br. pp. 24-25, 31-32.) There are many situations where property is subject to a lien but the owner thereof is not personally liable to the lienor. Familiar examples include mechanics liens of subcontractors not in privity of contract with the property owner, mortgages put on property by a former owner, and policy loans made on the sole security of life insurance policies. Respondents' policies did not make policy loans a personal obligation (Finding 22, R. 135-136), nor do life insurance policies generally. (R. 222-225.)

Without a premium note, without any kind of an express agreement on the part of the insured to stand personally liable, the Government occupies the same position as the life insurance company which has made

a loan on the sole security of a policy. Analysis of the Act shows that that is just the position Congress intended the Government to occupy; the whole approach is to treat the unpaid premiums as a policy loan on the sole security of the policy and to subrogate the Government to the companies' rights in connection with such loan. Section 408 gives the Government the same lien on policy values that is found in insurance company policy loans. The payment of unpaid premiums plus policy loan interest out of matured policies provided by Section 409 operates in exactly the same manner as if the policy contained an automatic premium loan provision requiring the company to treat accruing unpaid premiums as a policy loan. That the interest called for by Sections 409, 410 and 411 is "interest at the rate provided for in the policy for policy loans" confirms the policy loan approach, and thus disproves rather than proves the existence of an underlying debt to the insurer.

Section 406 of the 1942 amendments makes the policy loan concept explicit: ". . . the amount then due shall be treated by the insurer as a policy loan on such policy . . ."

Coming now to the implied obligation argument, we concede that an order for commercial liability insurance coverage and the acceptance of the risk implies an obligation to pay for the coverage, just like an order for groceries followed by delivery of the groceries imports an obligation to pay for them. Life insurance presents a different situation. In the absence of specific language to the contrary in the policy, the

insurer will not be considered to have assumed the risk until the necessary premium is paid, and the insured will not be personally obligated to pay the premiums. Vance on Insurance (3rd ed.) p. 94; 29 Am. Jur. 327, Insurance Section 377. At least one premium had been paid prior to protection on all policies placed under protection, and the insureds were not obligated to pay the next premium if they did not want to. This established contractual relationship could only be altered by an express and specific modification; and so far as obligation to pay premiums was concerned, such modification never occurred.

The basic difficulty with the Government's implied contract argument is that the furnishing of protection is just as consistent with indemnity as it is with guaranty.

Whether I am personally liable to the grocer who sends me groceries on the strength of a relative's promise to pay for them depends on the facts, on whether the relative was making a gift of the groceries or agreeing to be secondarily liable.

So here. We only confuse the issue if we say the insured is liable to the insurer because it would be unfair to the insurer if he were not liable. There is no unfairness to the insurer as long as someone is bound to pay him. Whether that someone is the Government alone, or the insured and the Government, depends on what Congress provided for: a gratuity (if a benefit made available to one about to offer his services to his country at an extremely low rate of pay is a gratuity) or a guaranty with rights of full reimbursement.

2. The Minor Premise.

The Government makes a strenuous effort to list every instance in which anyone used the word "guaranty" in connection with the 1918 and 1940 Acts (Br. 53-55; 102-103, 107) and argues:

> "The concept of 'guaranty' has a definite and well known legal significance in our law. Congress is presumed to use established legal terms with their recognized meaning." (Br. p. 27.)

Perhaps realizing the weakness of this argument (since Congress did not use the *term* "guaranty" anywhere in the Act); it is further argued (Br. p. 27) that when Congress utilizes a *transaction* familiar to the common law it must be presumed that Congress meant to ascribe to that transaction the usual legal characteristics and consequences.

Though a rose by any other name be still as sweet, calling a mushroom a rose does not make it a rose. In the more precise language of the Government's Brief, p. 27, footnote 16:

> "Just as the word 'contract' is not needed to constitute a contract, it is well settled that the *presence or absence* of the label 'guaranty' is not decisive in determining whether a particular transaction is one of guaranty; instead, the transaction must be viewed in the light of its incidents, the attendant circumstances, and the intentions of the parties." (Emphasis added.)

Whether the position here occupied by the United States should be characterized as that of a guarantor, a surety, a voluntary indemnitor, or as something

apart from any of these familiar categories depends on the facts.

Certainly the United States volunteered to be bound. For reasons of its own, some selfish (it wanted worry-free soldiers), some paternalistic (it owed a duty of protection to these men and their dependents) it proposed these transactions and designated and specified all of the incidents thereof.

The purpose of Article IV was to confer a benefit. The conditions under which the benefit was offered were specified in the Act, officially explained to the Armed Forces and embodied in contract documents. The persons to whom the benefit was offered were peculiarly entitled to receive it, and to consider that to the extent the value of the advantages offered exceeded the cost of the conditions exacted it was one of the perquisites of an otherwise burdensome employment.

The obligation of the United States was not tendered *after* it was requested; it was offered in advance to all who might qualify. Once it had made its standing offer it could not refuse those who met the conditions; and it could not add new conditions after its offer had been accepted.

In these several respects this transaction is a different kind of cat than the breed known to the law as "guaranty". It looks much more like the transaction called "voluntary indemnity".

As a matter of fact the word "indemnify" *is* used in the Act (Sec. 408), and in a context that seems

highly significant. If the Government was a guarantor why should it be "indemnified" rather than "secured" or "reimbursed"?

3. The Conclusion.

From these premises the Government jumps to the conclusion that it has the right to be reimbursed by one whose debt it has paid. This is quite a jump. It completely disregards the fact that what the Government took by way of offset differed from and exceeded the amount which it would have been called upon to pay under the 1940 settlement formula. See discussion, Heading VI. C. 2. and 3., pp. 22-29, supra.

The Government attempts to bridge this gap with a whole series of arguments, ending up with the admission that perhaps it did take too much. (Br. 25-28, 37-45.) We have already pointed out the unsoundness and inconsistency of these arguments under Heading VI. C. 2., pp. 22-27, supra and will not plough that ground again.

B. THE GENERAL PURPOSES OF THE ACT ARGUMENT.

The argument (Br. pp. 17-20) that the general purpose of the Act is to provide temporary moratoria not discharge of obligations is in effect an attempt to bolster the common law guarantor argument for if there was no obligation to be discharged the argument is pointless.

The answer to this argument is provided by the Administrator himself in his Decision No. 742 where he says (R. 88-89):

"... the fundamental basis of the entire Act is protection of the person in service by temporary moratoria on certain obligations—as contract liabilities, rents, taxes and so forth. As this principle could not apply to insurance premiums payable only voluntarily, the device was adopted of having the Government guarantee such payments upon the insured's application."

The serviceman was obligated to pay rent, bills and taxes, to respond to legal process, and perform contractual obligations, but he was not obligated to pay premiums. Accordingly protection of his insurance could not and cannot be forced into the mould of "temporary moratoria on debts". Article IV is the only place in the Act where the Government enters the picture as a third party. It was necessary that it come in *because* the insured was not obligated to pay premiums, and because if it didn't promise to pay premiums on lapsed policies, the insurance companies would be subjected to unfair and probably unconstitutional burdens.

Since something quite different than a temporary suspension of obligations is involved in Article IV analogies drawn from other portions of the Act just will not fit; and since there was no personal obligation to be postponed or discharged the whole argument is, in truth, pointless.

C. THE CLARIFICATION BY AMENDMENT ARGUMENT.

In another attempt to bolster the common law guarantor argument, the Government claims (Br. pp. 15, 66-70) that by putting an express indebtedness provision into the Act in 1942 Congress was declaring that the law had provided for such an indebtedness all along, that it was not changing but merely clarifying the law.

This is not so because: (1) Section 406 as amended in 1942 is expressly limited to applications subsequently approved. See Heading VI. B. 3. a. pp. 18-19, supra. (2) The intent to exclude previously protected policies is evident in the legislative history. See Heading VI. D. 3. pp. 33-36, supra. (3) Section 408(1) of the 1942 amendments says that the rights and obligations of previously protected insureds are not changed or affected by the amendments. See Heading VI. B. 3. b. pp. 19-21, supra.

D. THE GIFT ARGUMENT.

Whatever of real substance there is in the Government's position in this case reduces down in the final analysis to the claim that Congress could not have intended the result we contend for because it imports an intention to make an undeserved gift, because it causes loss to the public purse, or because it favors some servicemen over others. As we have seen the various attempts to find support for the Government's position in the language of the Act do not stand up under scrutiny. The gift argument does not allow of equally searching or equally conclusive examination.

This is because we must here dispute such questions as whether the serviceman *should have* expected to pay for the protection of his insurance, and whether Congress *should have* imposed a liability to reimburse.

Leaving behind the analysis of statutory language and contract documents and venturing into the never-never land of "should have been", we can consider and discuss and try to weigh and balance the circumstances and equities involved.

There can be no question that Congress *could* grant free insurance or free insurance protection to men in the military service. All men who enter the service now get free insurance during their service under the Servicemen's Indemnity Act of 1951. (38 U.S.C. Secs. 851-858.) See also 38 U.S.C. 802 (d), which provided insurance for the beneficiaries of certain men who died or were disabled before applying for National Service Life Insurance. Many other examples of special benefits and perquisites given to military personnel by Congress could be cited. Depending on one's point of view these may be regarded as gifts or as the equivalent of extra pay for a generally low-paid group of people.

What about the inequitable results mentioned in Administrator's Decision No. 742 (R. 86-88) and in the Government's Brief (pp. 12-13, 32-36)? Is there an unjustified "discrimination" between those who let their policies lapse and the beneficiaries of those who died during protection? At the time of application no applicant knew whether he would survive his tour of duty. If he should die the beneficiary

named in his policy was going to get a death benefit that would not have existed without protection. At the time of application he was *told* that that would happen, and in his application he expressly agreed that it should happen. On death there is a fund in existence because of the protection, from which full payment can be made without difficulty. Quite different is the case of the man just out of the service. He has no such fund, he is struggling to re-establish himself as a civilian and very likely needs to watch every penny.

If the recently separated man has the cash to reinstate his protected insurance and thereafter pay premiums thereon, he is substantially better off than the man who does not. Under the circumstances it would seem perfectly fair to require the reinstater to pay back premiums as a price of keeping the policy with its inherent values while allowing the non-reinstater to cut his losses and walk away without further penalty.

And what about the "inequity" of giving "free" insurance to appellants and others like them while requiring premiums from all those who took out National Service Life Insurance? Here again difference of treatment is based on difference of circumstance. Congress could well have considered that the private company insurance taken out by the insured prior to putting on the uniform represented the man's own estimate of what his family then needed, apart from any thought of military service; and that it should be maintained, within the $5,000 limitation, even if he

also could take out National Service Life Insurance. Section 402 of the 1940 Act limited protection to policies taken out at least 30 days before entry into military service. Congress apparently considered that this was all the protection the Government needed against the possibility that insurance would be taken out to take advantage of the "free insurance" provisions of the Act.

Why it is unfair for one insured to apply more cash value than does another toward payment of premiums accruing during protection? When making application the man whose policy already had substantial cash value knew just what he was committing.

In all these cases the Government is putting its finger on the fund, forbidding its alienation, and thus protecting itself as far as it could without requiring a *cash* outlay from a man who had just completed a dangerous and arduous tour of duty in defense of his country.

The supposed inequality between pre-Pearl Harbor soldiers and those who entered the service after October 6, 1942 (See Decision No. 742, R. 88; Br. p. 34, fn. 19) likewise proceeds from difference of circumstance. In October 1940 the new private was paid $21 a month; in October 1942, $50 a month. In October 1940 there were no family allowances for men in the lower enlisted grades; in June 1942 the Servicemen's Dependents Allowance Act (Pub. Law 625, 77th Congress) became law. Those first called were pinched tighter financially, it was more difficult for them to protect their dependents with insurance and otherwise,

their personal sacrifice before Pearl Harbor and after was greater than that of any other group. Further, by 1942 Congress could see that the obligations it had assumed in the 1940 Act involved large amounts of money and could well decide that it did not want to go any further along those lines. In 1940 Congress could well have thought that any loss to the Government would be small. In fact, the entire "difference" shown on final accounting might be covered by cash values and the Government's profit factor.

It must be remembered that the real beneficiaries of Article IV were the dependents of the serviceman who would receive the proceeds of his insurance if he died. Certainly the serviceman could obtain no personal enrichment from the provisions of this Act. Before applying for protection under the Act he had the choice of letting the policy lapse without further financial liability or of risking the capital value of the policy for the protection of the policy beneficiary. If he elected protection under the Act and died in service, both the Government and the beneficiary were protected and the insurance company was stuck with the war risk. If he elected protection and lived, he could only regain his personal interest in the policy by paying the defaulted premiums, plus policy loan interest. In either event, the serviceman himself did not get something for nothing.

The accumulation of cash value during protection (see Br. p. 42) was of no profit to the insured; if he reinstated he paid for it; if the policy lapsed the Government received credit for it. In all cases cash value

accumulating in a given period is less than premiums for that period.

Other matters going to the equities include the various acts and omissions of the Government which we say raise an estoppel (see Heading VI. F. 3., p. 52, supra).

Here are a whole host of considerations of policy which might have been urged on Congress in 1940 when it was considering the legislation in question. We can only speculate as to what Congressional reaction would have been if they had been urged. There is no evidence that ~~they~~ were urged.

To say that Congress *should* have required such reimbursement because of such consideration is to disregard the *fact* that it did not expressly do so.

To say that Congress *did* so require because of such considerations involves indulgence in a highly unreliable form of inverse reasoning (it should have, therefore it did). Such reasoning seems more than a little out of place in a case where there are strong indications in the Act that reimbursement was not intended.

Even without such indications, the *Gilman* case tells us that such considerations are "more appropriately for those who write the laws, rather than for those who interpret them." (347 U. S. at 513.)

VIII. CONCLUSION.

We respectfully submit that the decision of the Court of Appeals should be affirmed and the District Court ordered to enter judgment in respondents' favor, with interest at the legal rate from date of deduction to date of payment.

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LAWRENCE A. SCHEI,
Of Counsel.

September, 1956.

(Appendices A, B, C and D Follow.)